Supreme Court, U.S.
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No. 09-979

IN THE

Supreme Court of the United States

ALTRIA GROUP, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER ALTRIA GROUP, INC.

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RULE 29.6 STATEMENT

The Rule 29.6 Statement remains unchanged. See Altria Pet. ii.

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ARGUMENT

The government does not seriously dispute that the legal issue presented by Altria's petition – whether a corporation may be found to have specific intent to defraud in a RICO case without any evidence that any individual in the corporation had such specific intent – is certworthy and involves a conflict among the circuits. Clearly, it is and it does. *See* Altria Pet. 7-8, and cases cited.

Rather, the government attempts to avoid this legal issue by arguing that there is evidence that Altria had specific intent. U.S. Br. Opp. 70-72. The government's attempt at avoidance need not detain the Court long, because the government fails to cite any *evidence* that any specific person at Altria had specific intent to defraud.

The government argues that "Altria's executives were active participants in the enterprise." U.S. Br. Opp. 70. But "participation" is not the same thing as specific intent to defraud. In arguing otherwise, the government has forgotten that specific intent must be proved as to each defendant, and cannot merely be assumed on the basis of guilt by association. *See* Altria Pet. 8-9, and cases cited.

The evidence of "participation" pointed to by the government is not evidence of specific intent. For example, the government cites instances in which Altria joined in funding CTR special research projects. U.S. Br. Opp. 70. As an initial matter, these were among the alleged predicate acts that the court of appeals did *not* affirm. *See* Pet. App. 55a-56a. Beyond that, there is no evidence that anyone at Altria believed that the research projects were

fraudulent or scientifically unsound. The record is to the contrary.[1] Hence, evidence of funding CTR special research projects is not evidence of specific intent.

The government says that Altria executives attended meetings of TI and its committees. U.S. Br. Opp. 70-71. Again, the government cites evidence that was not a basis for Altria's liability. The government's pleadings charged only the cigarette manufacturing defendants, not Altria, with the acts of TI. *See, e.g.*, Pet. App. 2155a, ¶ 79.

Critically, the government relegates to a footnote the four predicate acts on which the court of appeals rested its affirmance of Altria's liability. U.S. Br. Opp. 71 n.21. This footnote fails to cite any evidence of Altria's specific intent at all.

Indeed, the government does not even argue as to Altria – as it does with respect to other defendants, U.S. Br. Opp. 42-45 -- that Altria representatives made statements that contradicted the views of others in the company. There is no such evidence in the record, and the government cites none. Thus the finding of specific intent on the part of Altria cannot be saved even by the government's current version of the "collective knowledge" theory.

The government argues that the district court's finding of conspiracy to violate RICO provides an independent basis for Altria's liability. U.S. Br. Opp.

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[1] *See, e.g.*, C.A. App. A6299, saying of one of the Altria-funded researchers that "Dr. Sterling and colleagues have published 24 scientific papers in respected research journals."

71-72. As noted in Altria's petition, Altria Pet. 7, this argument is wrong, because a RICO conspiracy based on predicate acts of mail and wire fraud also requires a showing of specific intent to defraud. *E.g., United States v. Peterson*, 244 F.3d 385, 389 (5th Cir. 2001). This follows from the principle that "[c]onspiracy to commit a particular substantive offense cannot exist without *at least* the degree of criminal intent necessary for the substantive offense itself." *Ingram v. United States*, 360 U.S. 672, 678 (1959) (emphasis in original; internal quotation marks omitted); *accord, e.g., United States v. Feola*, 420 U.S. 671, 686 (1975). For this reason, the government's failure of proof on the issue of Altria's specific intent to defraud requires reversal of the RICO conspiracy finding against Altria as well.

Thus, for all the government's efforts at avoidance, Altria's petition squarely presents the legal question whether a corporation may be found to have specific intent to defraud in a RICO case without any evidence that any individual in the corporation had specific intent. The Court should grant certiorari to resolve this question, which is important if specific intent is to serve as an effective limitation upon the sweeping scope of fraud-based RICO liability. In the alternative, the Court should summarily reverse the judgment of liability against Altria, based upon the government's failure to point to any record evidence of specific intent on the part of Altria.

CONCLUSION

The petition of Altria Group, Inc. for a writ of certiorari should be granted. In the alternative, the judgment of the Court of Appeals should be vacated as to Altria Group, Inc., based on the government's failure of proof on the issue of Altria's specific intent.

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Respectfully submitted,

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